IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.153 of 1991

Shankar Dnyaneshwar Sutar ... Appellant

V/s

Balkrishna Ananda Gaikwad ..Respondent

Mr. S. Pradhan i/b .A.K.Abhyankar for Appellant

Mr.M.D.Angal for Respondent

CORAM:S.R.SATHE,J.

DATED:16th August 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of the 2nd Additional District Judge, Sangli in Regular Civil Appeal No.36 of 1984 whereby the judgment and order passed by the Civil Judge, J.D., Vita in Regular Civil Suit NO. 84 of 1979 directing the defendants to pay an amount of Rs.7500/- to the plaintiff and rejecting the claim of specific performance of the plaintiff was confirmed and appeal was dismissed, the original plaintiff has

filed this Second Appeal. For the sake of convenience hereinafter the parties are referred as the plaintiff and defendant.

2. The brief facts giving rise to this appeal are as under :-

. The suit property described in detail in para 1 of the plaint was owned by the defendant. He agreed to sell the suit property to plaintiff for Rs.10,000/- and after accepting the earnest amount of Rs.3,000/- executed an agreement to sell on 14-4-1975. As per the stipulation in the agreement, the sale deed was to be executed in the month of December 1975. After execution of the agreement the plaintiff paid an additional amount of Rs.8,806/- to the defendant. Out of the said amount Rs.4500/- was in fact to be adjusted towards the balance consideration of Rs.2,500/- which was to be paid at the time of execution of the sale deed. The parties, therefore, went to the Sub Registrar’s office however for some reason sale deed could not be executed on that day. Thereafter defendant’s started to avoid to execute the sale deed. Plaintiff had already received the possession of the suit property under the agreement to sell. Plaintiff therefore filed Regular Civil Suit No.72 of 1976 for permanent injunction

restraining defendant from obstructing the plaintiff's possession of the suit property. However, the said suit was dismissed. Even thereafter the defendant did not execute the sale deed. Hence plaintiff filed the present suit. The defendant filed his written statement at Exh.16 and contended that as he was in financial difficulties agreement to sell was to be executed but time was never the essence of the contract. He also contended that plaintiff was not at all ready and willing to perform his part of the contract and get the sale deed executed. The defendant, therefore, issued notice dated 7-4-1976 to the plaintiff and asked him to get the sale deed executed but plaintiff did not get the sale deed executed but simply filed suit for perpetual injunction with an intention to usurp the property without payment of price. He further contended that plaintiff in fact avoided to execute the sale deed even after issuance of notice by him and as such the agreement to sell stands cancelled. Hence on these grounds the defendant prayed for dismissal of the suit.

3. On these pleadings the learned trial Judge framed issues at exh.17 and after considering the evidence adduced by both the parties the trial Court came to the conclusion that the plaintiff has failed to show that he was ready and willing

to perform his part of the contract and as such rejected the plaintiff's claim for specific performance of contract and directed the defendant to return the earnest amount received by him.

4. Being aggrieved by the said order, the plaintiff filed Civil Appeal No.36 of 1984. As the same also came to be dismissed plaintiff filed the present appeal.

5. While admitting the appeal on 18-4-1991 this court formulated the following substantial questions of law, viz.

> i)Whether the Courts below were right in holding that the appellant plaintiff was not ready and willing to perform his part of the contract.
>
> ii) The appellate court as well as the trial Court were in error in permitting the defendant to lead evidence regarding agreed price contrary to the provisions of Sections 91 and 92 of the Evidence Act.
>
> iii) It was an error on the part of the Courts below to hold that the price

agreed between the parties was Rs.3000/- per acre and that the defendants had agreed to sell only six acres at that rate and not 9 acres.

iv) The appellate Court was in error in permitting the defendant to make out a new case contrary to the terms of written agreement although there was no pleading to that effect in the written statement.

v) The courts below were in error in permitting the defendant to make out a case under Section 20(2) of the Specific Relief Act in the absence of any pleadings and contrary to the provisions of Section 91 of the Evidence Act.

vi) It was further an error to hold that by decreeing the plaintiff's suit for specific performance hardship would be caused to the defendant and it would be also inequitable in view of section 20(20(b)(c) of the Specific Relief Act.

6. Though the above mentioned substantial questions of law were formulated, the learned Advocate for the plaintiff urged only points (1), (ii) and (iii) mentioned above and submitted that

there was sufficient evidence on record to show that though the price of the suit property was fixed at Rs.10,000/- even after the execution of the agreement to sale the plaintiff paid some additional amount from time to time to the defendant and thus paid in all Rs.11,806/- so under such circumstances the court wrongly held that plaintiff was not ready and willing to perform his part of the contract. He also canvassed before me that court should not allow the defendant to make out a case contrary to the agreement to sale by ignoring provisions of Section 91 and 92 of Indian Evidence Act. He therefore submitted that appeal be allowed and the orders passed by the court below be set aside and the decree for specific performance be granted in favour of plaintiff. As against this the learned advocate for the defendant supported the judgment and order passed by the first appellate Court.

7. It is not in dispute that suit property is owned by the defendant and he has executed an agreement to sell in favour of the plaintiff. Admittedly as per the terms of the agreement the price was fixed at Rs.10,000/- and earnest amount of Rs.3,000/- was paid at the time of agreement to sell dated 14-1-975. As per stipulations in the said agreement, sale deed was to be executed

in the month of December 1975. Both the Courts below have held that after the execution of agreement plaintiff had paid some amount to the defendant from time to time and thus he had paid in all Rs.11,806/- i.e. in fact more amount than the consideration agreed. If one looks to this aspect then apparently it gives impression that the plaintiff was always ready and willing to perform his part of the contract and as a result of same he must have paid the said amount to the defendant. However, from the scrutiny of the evidence and judgment of both the courts below it is clear that though in the sale deed it was mentioned that consideration would be Rs.10,000/- the plaintiff was in fact supposed to pay Rs.18,000/- and the said amount of rs.8,000/- was to remain unaccounted and as such more payment than Rs.10,000/- was actually made. The learned advocate for the plaintiff argued before me that the lower Court should not have allowed the defendant to lead evidence contrary to the terms of agreement as it was hit by Section 91 and 92 of Indian Evidence Act. However, it must be noted that when the question arose as to how more amount than the consideration price mentioned in the agreement was paid, the parties were required to give explanation about the same and it is in that light the said evidence was required to be admitted. Section 92 of Indian Evidence Act,

proviso 3 reads as under :

> 92. Exclusion of evidence of oral agreement - when the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for purpose of contradicting varying, adding to, or subtracting from, its terms:
>
> Proviso (3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

. In view of the above provision it can be said that evidence that was adduced by the defendant in this behalf was permissible. Besides this from the evidence also it is very clear that both the parties have in fact admitted that consideration of Rs.18,000/- was to be paid but

both the parties had agreed to show only Rs.10,000/- in the agreement to sell. Both the courts below have, therefore, observed that such type of agreement was in fact not legal and valid and specific performance cannot be granted in such type of transaction. So, merely because more amount than the consideration mentioned in the agreement to sell has been paid by the plaintiff to defendant it can be said that plaintiff was all along ready and willing to perform his part of the contract. On the contrary, as compared to actual agreed consideration the entire amount was in fact not paid. Not only this but the dispute had arisen on that count so I think that there is no substance in the argument advanced by the advocate on behalf of the plaintiff in this behalf.

8. there is another aspect of the matter. It is an admitted fact that parties had in fact at one point of time decided to execute the sale deed and accordingly the defendant had been to Sub Registrar’s office. However no sale deed could be executed on that day. If really the plaintiff had an intention to get the sale deed executed by paying the balance consideration then certainly on the next day or within short period thereafter the plaintiff would have asked the defendant to

execute the sale deed but this has not happened. On the contrary, we find that thereafter plaintiff filed Regular Civil suit No.72 of 1976 simply for permanent injunction in respect of the suit property. In fact at that time atleast it was necessary for him to claim specific performance of the agreement to sell because the period mentioned in the agreement to sell had already lapsed. According to him he had paid more amount than the amount mentioned in the agreement to sell and cause of action for filing suit for specific performance had also arisen. However, we find that the plaintiff filed a suit simplicitor for permanent injunction. This conduct of plaintiff indicates that as he had received possession of the property he tried to take unfair advantage of the same and avoided to get the sale deed executed by paying balance amount. Taking into consideration all these aspects both the Courts below rightly held that plaintiff has failed to prove that he was ready and willing to perform his part of the contract and therefore the order passed by first appellate Court appears to be legal and correct and there is no necessity to interfere with the same in this Second appeal. Hence the second appeal is dismissed with costs.

(S. R. SATHE, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 136 of 1991

1. Ashok Sadashiv Sabale
2. Gracebai Sadashiv Sabale
3. Sadashiv Mathew Sabale ..Appellants

V/s

Kantilal Isaji Surti .. Respondent

Shri V.B.Rajure for Appellants

Shri Vinayak R. Ramdas (Absent)

CORAM:R.S.SATHE,J.

DATED:16th Aug. 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of 8th Additional District Judge, Pune in Civil Appeal No.727 of 1987 whereby the order passed by the Court of 5th Joint Civil Judge, J.D.Pune, decreeing the plaintiff’s suit for specific performance was confirmed and appeal was dismissed with costs, the original defendants have preferred this second appeal. For the sake of convenience hereinafter parties shall be referred to as the

plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under :-

. The house property described in detail in para 1 of the plaint was owned by defendant no.1. Defendant nos.2 and 3 are mother and father of defendant no.1. All of them were residing together. As the defendant no.1 wanted to clear the loan of some persons he decided to sell the suit property for Rs.6.000/- and executed agreement to sell on 1-12-1971 after accepting earnest money of Rs.2,000/-. As per terms and conditions of the agreement, the sale deed was to be executed within 2 years and balance amount was to be paid at that time. After the execution of the said agreement to sell the defendant no.1 was again in need of money. He, therefore, accepted Rs.2400/- on 15-12-1971, Rs.1200/- on 15-2-1972 and Rs.400/- on 17-4-1972. Plaintiff therefore asked the defendant to execute the sale deed as agreed. However, the defendant avoided to execute the sale deed. Hence on 23-8-1973 plaintiff issued notice to the defendant and called upon him to execute the sale deed. Even then the defendant did not execute the same. Hence plaintiff filed the present suit for specific performance of the agreement to sell.

3. The defendants filed their written statement at exh.43A and contended that they had never agreed to sell the suit property to the plaintiff for Rs.6,000/- and also denied the allegation that amount of Rs.2,000/- was paid to them by way of earnest money. They further contended that plaintiff being neighbour of the defendant showed willingness to help the defendants when they were in need of money and accordingly on 1-12-1971 he gave loan of Rs.1,000/- but got the agreement to sell executed for double the amount and promised that he would return the document on receipt of the amount. The defendants also contended that transaction between plaintiff and them was of loan and defendants were in fact paying interest of Rs.90/- per month to plaintiff. The defendants, therefore, prayed that there was no cause of action to file a suit for specific performance and hence the same be dismissed. Besides this without prejudice to the above contentions the defendants contended that at the time of alleged agreement to sell the value of the suit property was more than Rs.40,000/- and the suit is undervalued by the plaintiff.

4. On these pleadings the learned trial Court framed issues at Exh.50. After considering the evidence adduced by both the parties, the learned

trial Judge came to the conclusion that the plaintiff has proved the suit agreement. He therefore decreed the suit for specific performance in favour of the plaintiff.

5. Being aggrieved by the above mentioned order the original defendants filed Civil Appeal No.727 of 1987. After hearing the arguments of both the leaned advocates, the first appellate court also dismissed the appeal. Being aggrieved by the same the original defendants have filed the present second appeal.

6. On 13-3-1991 this Court admitted the present appeal on ground no.19, which reads as under :-

> 19. In view of the admission of plaintiff that amount was to be repaid within two years and he has filed the suit in September 1973, the suit is premature and thus not maintainable.

7. In view of the admission of the plaintiff that amount was to be repaid within 2 years and he has filed the suit in September 1973 the suit is premature and thus not maintainable.

8. Even from the bare reading of the agreement in question, it is quite clear that sale deed was

to be executed within 2 years. Admittedly the present suit is filed even before the expiry of the said period. It is true that entire consideration amount was paid even before the expiry of period of 2 years, however, that by itself would not entitle the parties to get the sale deed executed even prior to the date mentioned in the agreement particularly when there is nothing on record to indicate that when the loan payment was made it is acknowledged by making necessary endorsement in the agreement to sell, it was not decided that sale deed should be executed forthwith. Under these circumstances it is very clear that suit filed by the plaintiff was premature and is in fact liable to be dismissed on that count alone.

9. Hence the appeal is allowed. The order passed by the first appellate Court is set aside. The plaintiff’s suit is dismissed. Under these circumstances, parties to bear their own costs of this appeal.

10. Certified copy expedited.

(S.R.SATHE, J.)